

Update

Fisher on Matrimonial and Relationship Property

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Case commentary

Chapter 1 — Nature of relationship property — presumption of advancement

The presumption of advancement was mentioned in the unusual case of *Hurlimann v Noland* [2020] NZCA 42. Clifford J made the point that s 4(3) of the Property (Relationships) Act 1976 had abolished the presumption of advancement and so the donee had to prove that the apparent gift was indeed intended as such. See [1.29] and [1.30].

Chapter 2 — De facto relationships — indicia of living together

In *Rehu v Moke* [2020] NZHC 254 the cumulative effect of the indicia was found not to lead to a qualifying de facto relationship, resulting in the finding that a transfer of funds was a loan and not a gift. See [2.6].

Chapter 2 — De facto relationships — commencement of living together

In *Greenwood v Henderson* [2018] NZFC 10070, [2019] NZFLR 13 the relationship was held to have commenced when the respondent started paying rent, 12 months after moving in. See [2.9].

Chapter 2 — De facto relationships — intermittent relationships

In *Greenwood v Henderson* [2018] NZFC 10070, [2019] NZFLR 13, the serving of trespass notices and protection orders and a conviction for male assaults female created periods of living apart, but the emotional association and connection continued throughout. See [2.10] and [2.12].

Chapter 2 — De facto relationships — polyamorous relationships

In *Paul v Mead* [2020] NZHC 666, ss 52A and 52B of the Property (Relationships) Act 1976, and indeed the Act as a whole, apply to couples, that is, to relationships between two people. While ss 52A and 52B contemplate relationships succeeding each other in time, or overlapping or coexisting in time, they do not apply to polyamorous relationships. See [2.29], [2.31A] and [19.4].

Chapter 2 — De facto relationships — contemporaneous relationships

In *Ngavaevae v Harrison* [2017] NZHC 2788 a notice of claim over property was upheld, it being arguable that a property interest under the Property (Relationships)

Act 1976 may exist. That case involved contemporaneous relationships where a man had two families in two different residences. See [2.31].

Chapter 4 — Trusts — review of trustee’s discretion — Trusts Act 2019

The Trusts Act 2019 which comes into force on 31 January 2021 will provide a greater scope for review of trustee’s discretion. The types of trust disputes that arise in the context of a separation are very likely to be amenable to review under s 127 of the Trusts Act 2019. See [4.50].

Chapter 4 — Trusts — removal of trustees — Trusts Act 2019

The Trusts Act 2019 which comes into force on 31 January 2021 provides that trustees can be removed by the Court. It is anticipated that the principles most recently articulated in *Oldfield v Oldfield* [2019] NZHC 492 will be applied to the exercise of the discretion in the context of separation. See [17.34].

Chapter 4 — Trusts — occupational rent — s 44C, Property (Relationships) Act 1976

In *Greaves v Baldwin* [2019] NZHC 3390, [2019] NZFLR 473 the family home was owned by a family trust. The claim for occupational rent under s 44C of the Property (Relationships) Act 1976 was dismissed, following *Ronayne v Coombes* [2016] NZCA 393, [2016] NZFLR 672. See [4.52].

Chapter 5 — Agreements — construction of relationship property agreements

In *M v H* [2018] NZCA 525, [2018] NZFLR 918 the Court reaffirmed that the approach to interpretation of contracts in general governs the interpretation of agreements for the purposes of the Property (Relationships) Act 1976. The text is of central importance. See [5.8].

Chapter 5 — Agreements — relationship to maintenance

Where a s 21A agreement incorporates a compromise both as to relationship property and maintenance and the two parts are not severable, the ability to seek a review by the Court of the maintenance agreement under s 32 is severely limited by s 182(6) of the Family Proceedings Act 1980: *Hopkins v Whitehead* [2018] NZHC 1996, [2018] NZFLR 559. See [5.18].

Chapter 5 — Agreements — avoidance due to serious injustice — s 21J, Property (Relationships) Act 1976

In *Johnstone v Johnstone* [2018] NZHC 1541 the absence of liquidity to settle a compromise agreement was not sufficient to trigger s 21J. See [5.84].

Chapter 6 — Variation of agreements and trusts on dissolution — nuptial settlements

In *Wylie v Wylie* [2019] NZHC 2638 it was held that the trust was proximate to the wife’s earlier marriage and thus not proximate to the marriage of Dr and Mr Wylie. See [6.12].

Chapter 6 — Variation of agreements and trusts on dissolution — nuptial settlements

In *Booth v Booth* [2019] NZHC 2424, [2019] NZFLR 225 a restructure of a family farm resulted in an acknowledgment of debt between the couple’s company and the husband’s parents. In a strike out application the Court accepted (at that stage) that an

acknowledgement of debt could be a nuptial settlement as long as there was the relevant connection to the marriage. The claim was struck out on the basis that there was no basis for the Court to exercise its discretion. See [6.12].

Chapter 6 — Variation of agreements and trusts on dissolution — nuptial settlements

In *Preston v Preston* [2019] NZHC 3389 the Court found that the appointment of the wife as a discretionary beneficiary to a trust settled prior to the relationship was held to be a nuptial settlement but the discretion was not exercised taking into account certain criteria. See [6.15].

Chapter 9 — Protecting the non-owner spouse or partner — notice of claim — s 42, Property (Relationships) Act 1976

In *Meredith v Soroka* [2019] NZHC 2723, [2019] NZFLR 508 notices of claim under s 42 were upheld and the respondent's attempts to have them removed under s 143 of the Land Transfer Act 2017 rejected. Properties were held in trust with the respondent as the primary beneficiary. See [9.17], [9.31] and [9.33].

Chapter 9 — Protecting the non-owner spouse or partner — setting aside disposition — s 44, Property (Relationships) Act 1976

In *Cannon v Cox* [2019] NZFC 5363, [2019] NZFLR 556 a trust was involved. Because of a gifting programme in relation to the disposition, no valuable consideration was ever paid or intended to be paid. The Court ordered the trustees to transfer the home to the parties as tenants in common in equal shares. See [9.41] and [9.47].

Chapter 10 — Meaning of property — income protection insurance

In *Greaves v Baldwin* [2019] NZHC 3390, [2019] NZFLR 473 dealing with an income protection policy taken out during the marriage and the loss of income occurred three years before the separation. The Court held no new property rights could be said to arise after the issue of the policy, with the result that no new property right was acquired after separation but rather the continued disability was a condition of the progressive receipt consequential on exercising the right to claim. See [10.3].

Chapter 11 — Classification of property — company shares

Bonus shares and retained earnings in a company will generally be classified as relationship property, depending on the circumstances: *A v C* [2019] NZHC 2814 at [67] adopted the approach in *Gallichan v Gallichan* [2000] NZFLR 26 (HC). See [11.42].

Chapter 12 — Division of relationship property — unequal division

In *Greaves v Baldwin* [2019] NZHC 3390, [2019] NZFLR 473 unequal sharing of the income protection policy benefits 65/35 in favour of the salary earner was ordered taking account of the facts that had he not suffered a permanent disability his post-separation income would not be relationship property. See [12.35].

Chapter 12 — Division of relationship property — unequal division

In *Piccadilly v Piccadilly* [2019] NZFC 3695, [2019] NZFLR 393 it was held there was no impediment to ordering unequal sharing of negative property and their nuptial trust was ordered to be resettled on two new trusts with the net proceeds of sale settled in the two trusts unequally, 60/40 in the wife's favour. See [12.35].

Chapter 15 — Debts — relationship debt — liability to pay tax

In *Piccadilly v Piccadilly* [2019] NZFC 3695, [2019] NZFLR 393, it was held that penalties and interest on tax arrears or use of money interest were personal debts: the wife knew nothing of the husband's lack of disclosure to Inland Revenue of business transactions that affected the large tax indebtedness. See [15.7].

Chapter 19 — Proceedings under the Act — interrogatories

Interrogatories are permitted based on general civil legal principles having regard to the overall purpose of the Property (Relationships) Act. They must be relevant to the issues of the case and not be unnecessary or oppressive, vexatious or seek privileged information or be used for the sole purpose of ascertaining the names of witnesses: *Hatami v Kardan* [2018] NZFC 2898, [2019] NZFLR 3. See [19.33].

Chapter 19 — Proceedings under the Act — immunity for costs

A legally aided party has an immunity for costs, but immunity is not conferred retrospectively: an aided person cannot rely on immunity if the grant is made after a court has made its decision, even if costs have not been fixed: *B v A* [2020] NZHC 765. See [19.41].

Chapter 19 — Proceedings under the Act — grounds for costs

Simply because an application that could have been filed in the District Court is filed in the High Court, such as to sustain a notice of claim, will not of itself justify a lower costs award, the overall circumstances will be considered: *Ivanovska v Johnston* [2020] NZHC 457. See [19.42].

Chapter 19 — Proceedings under the Act — grounds for appeal

A concession on a matter of law at first instance is not binding even if there is no reservation of rights and a challenge to that legal issue can still form the basis of an appeal. So, an agreement as to classification of property will not preclude consideration on appeal: *Greaves v Baldwin* [2019] NZHC 3390, [2019] NZFLR 473. See [19.44].

Chapter 19 — Proceedings under the Act — further evidence on appeal

The fact that the evidence is not fresh is not an absolute disqualification but if the evidence is not fresh it will not generally be admitted unless the circumstances are exceptional and the grounds compelling: *B v A* [2020] NZHC 580. See [19.46].